84-1933

No. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

COREY OUTDOOR ADVERTISING, INC.,
Appellant,

v.

THE BOARD OF ZONING ADJUSTMENT OF THE CITY OF ATLANTA, NORMAN A. KOPLON, P.E., ACTING DIRECTOR OF THE BUREAU OF BUILDINGS OF THE CITY OF ATLANTA, THE BUREAU OF BUILDINGS OF THE CITY OF ATLANTA, AARON TURPEAU, COMMISSIONER OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT OF THE CITY OF ATLANTA, THE DEPARTMENT OF COMMUNITY DEVELOPMENT OF THE CITY OF ATLANTA, THE CITY OF ATLANTA, a municipal corporation, THE GEORGIA TRUST FOR HISTORIC PRESERVATION, INC.,
Appellees.

On Appeal from the Supreme Court for the State of Georgia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Section 16-28.019(13) of the Code of Ordinances of the City of Atlanta is unconstitutionally vague, indefinite and ambiguous and therefore violates the requisite standards for such ordinances as established by the United States Supreme Court?

2. Whether the Board of Zoning Adjustment of the City of Atlanta's interpretation of Section 16-28.019(13) of the Code of Ordinances of the City of Atlanta and its application thereof to Appellant violated Appellant's right to due process of the laws under the Constitution of the United States?

3. Whether the Board of Zoning Adjustment of the City of Atlanta's interpretation of Section 16-28.019(13) of the Code of Ordinances of the City of Atlanta and its application thereof to Appellant violated Appellant's right to equal protection of the laws under the Constitution of the United States?

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IN THE

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OCTOBER TERM, 1984

No. ————————

COREY OUTDOOR ADVERTISING, INC.,

Appellant,

v.

THE BOARD OF ZONING ADJUSTMENT OF THE CITY OF ATLANTA, NORMAN A. KOPLON, P.E., ACTING DIRECTOR OF THE BUREAU OF BUILDINGS OF THE CITY OF ATLANTA, THE BUREAU OF BUILDINGS OF THE CITY OF ATLANTA, AARON TURPEAU, COMMISSIONER OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT OF THE CITY OF ATLANTA, THE DEPARTMENT OF COMMUNITY DEVELOPMENT OF THE CITY OF ATLANTA, THE CITY OF ATLANTA, a municipal corporation, THE GEORGIA TRUST FOR HISTORIC PRESERVATION, INC.,

Appellees.

On Appeal from the Supreme Court for the State of Georgia

JURISDICTIONAL STATEMENT

Appellant appeals from the opinion of the Supreme Court for the State of Georgia, entered March 14, 1985, and the order of the Supreme Court for the State of Georgia, entered on March 28, 1985, overruling Appellant's Motion for Rehearing, and submits this statement to show that the Supreme Court of the United States has jurisdiction and that substantial federal questions are presented.

OPINIONS BELOW

The Official Correction Notice issued by the Bureau of Buildings of the City of Atlanta adopting the decision of the Board of Zoning Adjustment of the City of Atlanta dated July 17, 1984 is reprinted at Appendix A hereto, pages 25a-26a, infra.

The Order of the Superior Court of Fulton County in *Corey Outdoor Advertising, Inc. v. The Board of Zoning Adjustment of the City of Atlanta et al.*, dated October 5, 1984, is reprinted at Appendix A hereto, pages 17a-24a, infra. The Opinion of the Supreme Court of the State of Georgia entered on March 14, 1985, is not reported. It has been reprinted at Appendix A hereto, pages 1a-12a, infra. The Order of the Supreme Court of the State of Georgia entered on March 28, 1985 is not reported. It has been reprinted at Appendix A hereto, pages 13a-16a, infra.

JURISDICTION

Appellant was issued several Zoning Violation Correction Notices by the Bureau of Buildings for the City of Atlanta for alleged violations of Section 16-28.019(13) of the Code of Ordinances of the City of Atlanta. Said correction notices ordered Appellant to remove the north face of a general advertising sign Appellant had erected. Appeals were taken to the Board of Zoning Adjustment of the City of Atlanta. Appellant's appeal contended that Section 16-28.019(13) was unconstitutional in that it is vague, indefinite and ambiguous and therefore void and unenforceable under the federal and state Constitutions. Appellant also alleged that the Bureau of Buildings had arbitrarily interpreted Section 16-28.019(13) to the detriment of Appellant in a manner contrary to the historic interpretation of the ordinance thereby denying Appellant due process and equal protection of the law. The Board of Zoning Adjustment did not deal with these issues, instead it merely ordered Appellant to dismantle its entire sign. This action had the effect of validating

the ordinance under attack. Thereafter, Appellant filed an appeal to the Superior Court of Fulton County, Georgia seeking injunctive and declaratory relief raising the same constitutional issues with respect to the ordinance as raised before the Board of Zoning Adjustment. The Superior Court denied Appellant's relief declaring Section 16-28.019(13) to be not overlybroad, not overly restrictive, reasonable, clear and unambiguous and therefore constitutional. The Superior Court also found that no state or federal equal protection or due process rights of Appellant had been violated.

Thereafter, Appellant filed an appeal to the Supreme Court of Georgia, raising the same constitutional issues. The Supreme Court of Georgia affirmed the trial court, declaring Section 16-28.019(13) to be constitutional, clear and unambiguous and that no state or federal equal protection or due process rights of Appellant had been violated in the application of the ordinance to Appellant. Notice of Appeal to this Court was filed in the Supreme Court of the State of Georgia on June 6, 1985 and is reprinted at Appendix B, pages 27a-29a.

This Court has jurisdiction to review this decision by direct appeal pursuant to 28 U.S.C. § 1257(2) by reason of the fact that the highest court of the State held in favor of the validity of a state statute against a constitutional challenge. The following cases hold that a city ordinance is a "state statute" within the meaning of 28 U.S.C. § 1257(2). *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943): *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 267, 48 S.Ct. 489, 72 L.Ed. 801 (1928); *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953).

STATUTE INVOLVED

The validity of Section 16-28.019(13) of the Code of Ordinances of the City of Atlanta is involved. This statute has been reprinted as Appendix C, page 30a, infra.

STATEMENT

On September 8, 1983, the Bureau of Buildings of the City of Atlanta (hereinafter referred to as "BOB") issued to Appellant Corey Outdoor Advertising, Inc. (hereinafter referred to as "Corey") a building permit for the erection of a general advertising sign to be located at 1558 Peachtree Street, Atlanta, Georgia. An inspection of the site was made by a zoning inspector for the BOB prior to the issuance of the permit. The building permit was issued after the inspection.

On March 16, 1984, the BOB issued a new building permit to Corey for the same location for the erection of a similar general advertising sign based on an application filed by Corey to have the initial permit re-issued prior to its automatic six (6) month expiration. A second inspection was conducted in connection with Corey's application for the March 16, 1984 permit. This inspection was conducted by the same zoning inspector.

On March 22, 1984, the BOB issued a third general advertising sign permit to Corey after a third inspection of the site for the location which permit upgraded the permit issued on March 16, 1984 to allow construction of a billboard containing an additional 528 square feet.

After the issuance of the third permit, Corey constructed the sign at a cost of approximately $88,879.01. The sign which Corey constructed had two faces, one facing traffic travelling south on Peachtree Street (the north face) and one facing traffic heading north on Peachtree Street (the south face).

On May 30, 1984 the Georgia Trust for Historic Preservation (hereinafter referred to as the "Georgia Trust") called the BOB and requested that the BOB send an inspector to measure the distance from Rhodes Memorial Hall to the sign, contending that the sign was within 300 feet of Rhodes Memorial Hall, a site on the National Historic Registry. The same BOB inspector who

had concducted the three previous inspections again inspected the site and, with no notice to Cory, on May 30, 1984 issued a Zoning Violation Correction Notice, notifying Corey that the sign was within 300 feet of an historic site, Rhodes Memorial Hall, and therefore was therefore in violation of Section 16-28.019(13) of the Zoning Ordinances of the City of Atlanta. This notice also contained a Stop Work Order for the *south* face of the sign. Thereafter several additional similar notices were issued. The effect of these notices was to permit Corey to maintain the *north* face of the sign because it was not visible from Rhodes Memorial Hall.

On June 8, 1984, both Corey and the Georgia Trust appealed to the Board of Zoning Adjustment of the City of Atlanta (hereinafter referred to as the "BZA") from the issuance of the Zoning Violation Correction Notices issued by the BOB. Among other issues, Corey's appeal argued that Section 16-28.019(13) was unconstitutionally vague in that it did not set forth a method for measuring the 300 foot distance limitation and that the BOB had acted arbitrarily by instituting a different method of measurement (a straight line) than it had historically used in measuring distances involving all other general advertising sign permit applications previously submitted by Corey to the BOB (which had been measured from point to point along the abutting right of way) Corey argued that by measuring the distance from the sign to the boundary of Rhodes Memorial Hall along the abutting right of way of Peachtree Street as the BOB had historically done the distance is 344.5 feet (and therefore beyond the proscribed 300 foot distance limitation); while if the distance is measured in a straight line from the closest boundary of Rhodes Memorial Hall to the closest point of the sign as the Georgia Trust contended, the distance is less than 300 feet and the sign is therefore in violation of the ordinance.

In its appeal to the BZA, the Georgia Trust argued that the BOB erred when it permitted Corey to main-

tain the north face of the sign because it was not visible from Rhodes Memorial Hall and thereby sought to require Corey to dismantle the entire sign as being violative of Section 16-28.019(13).

In support of its position, Corey introduced before the BZA a certified copy of the Zoning Ordinance of the City of Atlanta containing a number of ordinances by which exact methods of measurement for distance limitations involving general advertising signs were set forth, particularly including Section 16.11.011 which provided that the distance between general advertising signs on the same side of the street was to be measured from "point to point along the abutting right of way." (page 31a, infra.)

The BZA denied Corey's appeal, rejected the position taken by the BOB which would have permitted Corey to retain the *north* face of the sign because the copy on that face would not be visible from Rhodes Memorial Hall, and granted the Georgia Trust's appeal. The BZA thereupon revoked the building permit the BOB had previously issued to Corey and ordered the entire sign removed (dismantled) by August 17, 1984.

Thereafter, Corey appealed the decision of the BZA to the Fulton Superior Court. Corey's Complaint consisted of four counts:

(1) a statutory appeal from the decision of the BZA;

(2) an attack on the constitutionality of Section 28.-019(13), alleging violations of the due process and equal protection clauses of the federal and state Constitutions resulting from the vagueness of the Ordinance and from the arbitrary manner in which the BOB had applied the ordinance to Corey by changing its historic method of measurement so as to make the terms of the ordinance apply to the sign at issue.

(3) an application for permanent injunctive relief seeking to enjoin the BOB, the City of Atlanta and the BZA from revoking Corey's building permit; and

(4) a declaratory judgment that Corey had not violated Section 28.019(13) and that the building permit issued to it is valid and that Corey may rely on it to continue to use and maintain its sign on the property.

On October 5, 1984, the trial court issued an Order denying the relief sought by Corey and affirming the decision of the BZA. The trial court held that "Section 28.019(13) is both "simple and explicit" and that the words of the ordinance "erected on or within 300 feet of the boundaries . . ." "sets forth clearly and unambiguously that such prohibited distance is to be measured, from any point on the 'boundaries' of the historic site to any 'part of the general advertising sign' which is 'visible therefrom.'" (Pages 18a-19a, infra.) Thus, the trial court injected into the Ordinance the concept of a 300 foot perimeter surrounding an historic site in which a general advertising sign is permitted if any part of the sign is visible from the historic site. Further, the trial court held that no federal or state equal protection or due process rights of Corey had been violated by reason of the measurement of the 300 foot distance limitation from "any point" on the "boundaries" of Rhodes Memorial Hall to any "part of the general advertising sign" which "is visible therefrom (page 18a, infra). The trial court held that Section 16-28.019(13) had a "separate and distinct public purpose for using a different measurement from all boundaries of an historic site" (page 19a, infra); and thus Corey had not been treated arbitrarily when the 300 foot distance limitation was not measured from point to point along the abutting right of way (Peachtree Street) as set forth in Section 16.01.-011 as Corey had argued.

Corey then appealed to the Georgia Supreme Court which affirmed the Superior Court's decision.

As to Corey's argument that Section 16-28.019(13) is unconstitutionally vague, indefinite and ambiguous because it fails to provide explicit standards for measuring the

300 foot distance thereby permitting the BOB on an ad hoc basis to determine the method of measurement, the Supreme Court adopted the rationale of the trial court. The Supreme Court held that the clear purpose of the ordinance is to provide a zone of visual integrity around certain designated structures (page 3a, infra). The Supreme Court then held that the ordinance "clearly and unambiguously" sets forth that the prohibited distance is to be measured from "any point on the boundaries (plural) of the historic site to any part of the general advertising sign which is visible therefrom" (page 3a, infra).

The Supreme Court also rejected Corey's argument that its federal and state due process and equal protection rights had been violated when the BOB was permitted to arbitrarily change its method of measurement. The Supreme Court held that while other zoning ordinances might provide for measurement between signs point to point along the abutting right of way, the purpose of those ordinances is to "limit the distance *between* billboards, reducing visual clutter and distracting along the city streets" (page 3a, infra). The Supreme Court concluded that Corey's argument would "defeat the valid public purpose of restricting or minimizing visual blight surrounding an historic site, because the entire site is visually important, not just the front" (page 3a, infra).

On March 28, 1985, the Supreme Court denied Corey's Motion for Rehearing (page 14a, infra).

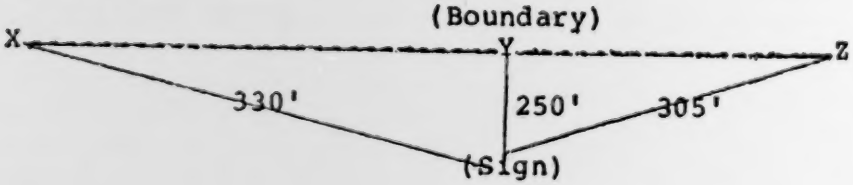
THE QUESTIONS ARE SUBSTANTIAL

In this case, the State Court of last resort has upheld the validity of a state statute (i.e., ordinance) against an attack on the ground that it violates the federal and state Constitutions in that it is void for vagueness, thereby violating the due process and equal protection clauses of the Constitution of the United States.

The Supreme Court's opinion on the constitutionality of Section 16-28.019(13) is premised entirely on the Court's conclusion that the ordinance ". . . sets forth clearly and unambiguously that such prohibited distance (i.e. the 300 feet) is to be measured "from any point" on the boundaries of the historic site to any part of the general advertising sign which is visible therefrom," (page 3a, infra). This is a total misreading of the *specific language* of Section 16-28.019(13). The ordinance as drafted does *not* provide that the 300 feet distance limitation is to be measured *"from any point"* on the "boundaries" of the historic site as the Supreme Court's opinion sets forth. The Supreme Court has added this saving language to the ordinance.

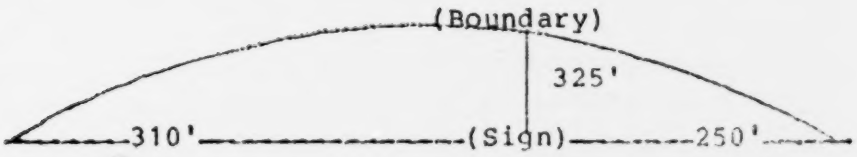
The Supreme Court has validated an otherwise unconstitutionally ambiguous ordinance by adding the very clause to the terminology of the ordinance which should have been included by the Atlanta City Council. The ordinance as drafted clearly does *not* state that the 300 foot distance is to be measured *"from any point"* on the boundaries of the historic site as the Supreme Court has opined. If the ordinance, in fact, did read that: "General advertising signs shall not be erected on or within 300 feet *'from any point'* of the boundaries of the properties which are located on the National Register of Historic Places if any part of the general advertising sign is visible therefrom" then the ordinance would have been clear, unambiguous and capable of passing constitutional muster.

The ordinance's ambiguity is demonstrated by the following illustration:



The above illustration makes it clear that the distance from a certain point (here the advertising sign) to the boundary of a certain property differs significantly when measured from different points on "the boundaries."

A second example of this is demonstrated by Illustration No. 2:



The ambiguities inherent in Section 16-28.019(13) could easily have been cured by simply adding a clause reading: "as measured from the closest point on said boundary line."

Every other provision of the Zoning Ordinance of the City of Atlanta supports Corey's argument regarding the lack of definiteness of Section 16-28.019(13). Section 16-11.011(6)(c) requires measurement between general advertising signs on the same side of the street to be measured "point to point along the abutting right-of-way." (Page 31a, infra). This same provision is also found in C-2, C-3, C-4, C-5, I-1, I-2, SPI-1, SPI-2, SPI-3 and SPI-4 zoning. Interestingly, Section 16-11.011(6)(c) also prohibits general advertising signs from being located within 1,000 feet of another general advertising sign on the same side of the highway ". . . as measured from the *nearest edges* of the signs" (emphasis added) (page 31a, infra). Thus, in each of these ordinances it is clear *where* the distances are to be measured from: "point to point along the abutting right-of-way" or "the nearest edges of the sign."

Similar careful draftsmanship in other provisions of the Zoning Ordinance highlight the lack of explicitness in Section 16-28.019(13). Section 16-28.019(7) provides

for the measurement of a 300 foot distance limitation from interstate highways from the *nearest outer* edge of the pavement of the interstate highway, limited access—freeway or expressway system within the city (page 31a, infra).

The same is true of the draftsmanship of the Georgia state code governing distance restrictions involving outdoor advertising signs. O.C.G.A. § 32-6-72 provides that no outdoor advertising sign shall be erected or maintained within 660 feet of the *nearest edge* of the right of way and visible from the main traveled way of the interstate or primary highways (page 32a, infra).

The explicit draftsmanship of these code sections emphasizes the poor draftsmanship and inadequacy of Section 16-28.019(13).

The litmus test for vagueness was established by the United States Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1971). There, the United States Supreme Court stated as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissably delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*

> Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1971) (emphasis added).

The *Grayned* test has been consistently upheld. In *Cramp v. Board of Public Instruction*, 368 U.S. 278, this Court invalidated an oath requiring teachers and other employees of the state to swear that they had never lent their "aid, support, advice, counsel or influence to the communist party" because the oath was the lacking in "terms susceptible of objective measurement" and failed to inform as to what the state commanded or forbade. The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. See also, *Connally v. General Construction Co.*, 266 U.S. 385; *Lanzetta v. New Jersey*, 306 U.S. 451. In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, this Court held:

> This ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *U.S. v. Harris*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions . . . . Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the state commands or forbids.' *Lanzetta v. New Jersey*, 306 U.S. 451, 453.

Moreover, it has been held that the *Grayned* standard "is applied even more strictly to statutes that inhibit free speech because of the value our society places on the free dissemination of ideas." *Hynes v. Mayor and Council of*

Borough of Oradell, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976).

In *Antonelli v. Planning Board of Waldwick*, 185 A.2d 431 (1962) a zoning ordinance provided in part as follows:

> Where the district boundary lines do not coincide with lot lines . . . or where it is not designated on said map by figures or dimensions, they shall be deemed 150 feet back from the nearest parallel street line . . . .

The Court held that the ordinance and map did not meet the test of exactness required by the law stating:

> It is difficult to say if the distance is 150 feet of the existing lot line, nor is there any guide as to whether the measurement should be from one street or the other. *Antonelli v. Planning Board of Waldwick*, 185 A.2d 431, 436 (1962) (later reversed on other grounds).

As a result, the Court determined that the ordinance in question did not have "the specificity required of zoning ordinances," *supra* at p. 436.

Also, in *South of Second Associates v. Georgetown, Colorado*, 580 P.2d 807 (1978), the issue was whether the City of Georgetown's historic preservation ordinance was unconstitutionally vague because it did not properly designate which properties came within certain preservation districts. The ordinance in question defined Historical Preservation District as:

> Any land or buildings having notable character qualities of historical and/or architectural significance as determined by the Historical Preservation Commission. An area may include structures or other physical improvements on, above, or below the surface of the earth.

The Supreme Court of Colorado in declaring the ordinance unconstitutional in this regard held that the definition of Historical Preservation District set forth in the ordinance vested unreviewable discretion in the City:

> Under the ordinances, a property owner cannot reasonably ascertain which architectural designs would entitle him to a certificate of appropriateness. Areas entitled to protection must be clearly delineated, are void for vagueness. *South of Second Associates v. Georgetown, Colorado*, 580 P.2d 807, 811 (1978).

Nowhere in its opinion does the Supreme Court deal with either the litmus test mandated by *Grayned*, supra, or with similarly drafted ordinances from other jurisdictions which have failed the *Grayned* test. By failing to establish "*explicit standards*" for the measurement of the 300 foot distance limitation, Section 16-28.019(13) fails the *Grayned* test. It leaves the basic policy decision of how the 300 feet is to be measured solely in the discretion of the BOB, which arbitrarily elected to apply a technique of measurement in the instant case to the detriment of Corey. This is particularly onerous when one considers the *unrebutted* allegation made by Corey before the BZA that the BOB had historically measured distances for *all* of Corey's prior building permit applications for general advertising signs utilizing the technique for measurement from "point to point along the abutting right of way." The BOB's decision to utilize a more direct measurement technique, a technique unrecited anywhere in the zoning ordinance, including Section 16-28.019(13), is now being relied upon by the BOB and the Georgia Trust to bring the general advertising sign in question within 300 feet of the boundary of Rhodes Memorial Hall; whereas, had the historically accepted method of measurement been utilized for the sign in question it would be 344.5 feet from the closest boundary of Rhodes Memorial Hall.

In its opinion, the Supreme Court attempted to solve the vagueness problem by adding language to the ordinance which would resolve its ambiguities. The Supreme Court would measure the distance "*from any point*" (page 3a, infra). However, the ordinance as drafted does not include this language. In fact, the ambiguity arises in part from the very absence of this type of definitive language. Vague statutes may not be judicially saved by the

addition of definitive language to resolve their ambiguities. Far from resolving the due process problem inherent in a vague statute, such judicial legislating adds to the problem. A citizen is required to be on notice of all statutes and ordinances. If a statute is too vague, however, for the average individual of common intelligence to understand, it is void and unenforceable because the citizen could not reasonably be called upon to be on notice of the proscribed conduct. Cleary, then, where the court adds language to resolve the ambiguities and simultaneously enforces a statute which was vague before the addition, citizens of ordinary intelligence may not reasonably be called upon to be on notice of the court's additions before those additions were made, without violating every notion of due process and equal protection of the laws.

CONCLUSION

For the foregoing reasons, the Supreme Court erred in upholding Section 16-28.019(13) against Appellant's claim that it is unconstitutionally vague. Additionally, the Supreme Court erred when it failed to determine that Section 16-28.019(13) had been arbitrarily applied to Appellant thus depriving it of due process and equal protection of the laws.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

41767

COREY OUTDOOR ADVERTISING, INC.

v.

THE BOARD OF ZONING ADJUSTMENTS OF THE CITY OF ATLANTA, *et al.*

Decided: Mar. 14, 1985

MARSHALL, Presiding Justice.

On September 8, 1983, the appellant (Corey) was issued a sign permit from the Bureau of Buildings (BOB) of the City of Atlanta to erect a billboard at 1558 Peachtree Street. The appellant renewed its permit on March 16, 1984. On March 22, 1984, the appellant received a permit for a larger, two-faced billboard at the same location (the permit at issue) after an inspection by a BOB inspector.

On May 30, 1984, the Georgia Trust for Historic Preservation notified the BOB that the billboard was being erected within 300 feet of Rhodes Memorial Hall, a historic property listed on the National Register of Historic Places, in apparent violation of § 16-28.019(13) of the city ordinance, to wit: "General advertising signs shall not be erected on or within 300 feet *of the boundaries* of the following properties which are located on the National Register of Historic Places if *any part* of the general ad-

vertising sign is visible therefrom; . . . e. Rhodes Memorial Hall." (Emphases supplied.) The BOB confirmed this by investigation, and violation notices, removal notices and stop-work orders as to the south face of the billboard were posted on the uncompleted structure and given to Corey's representatives.

Corey ignored these notices, completed the billboard and advertisements thereon, and appealed the issuance of these orders to the Atlanta Board of Zoning Adjustment (BZA). The Georgia Trust appealed to the BZA on the ground that the permit allowing *any* sign at that location violated the ordinance. The BZA ruled that the sign, as defined as the entire structure, including both the south and north faces, was within 300 feet of a historic-property boundary line in violation of the valid ordinance, and must be removed. Corey filed an appeal to the Superior Court of Fulton County, which appeal contained (1) a statutory appeal from the decision of the BZA; (2) an attack on the constitutionality of the underlying city zoning ordinance in question, § 16-28.019(13; (3) a prayer for permanent injunctive relief to enjoin the City of Atlanta and the BZA from revoking Corey's building permit; and (4) a prayer for a declaratory judgment that Corey had not violated § 16-28.019(13) and that the building permit issued to it is valid and that Corey may rely on it to continue to use and maintain its sign on the property.

Superior court affirmed the BZA; Corey appeals; we affirm.

1. The appellant contends that the ordinance in question is unconstitutional in that it is vague, indefinite and ambiguous, therefore void and unenforceable under the federal and state Constitutions, because it fails to provide explicit standards for measuring the 300-foot distance, hence impermissibly delegates to the BOB the right on an ad hoc basic to determine the technique for measuring such distance restriction.

The clear purpose of the ordinance is to provide a zone of visual integrity around certain designated structures which the City of Atlanta has deemed to have historical significance, preventing general advertising signs from marring historical sites by distracting from the view, overshadowing the site, or lessening the impact of the site. The prohibition against any part of such signs' being visible from the site prevents the ordinance from being arbitrarily applied when natural topography, trees, buildings or structures screen out such signs from view on or within the boundaries of such historic site.

The provision, "erected on or within 300 feet of the boundaries . . . ," sets forth clearly and unambiguously that such prohibited distance is to be measured from any point on the "boundaries" (plural) of the historic site to any "part of the general advertising sign" which "is visible therefrom." This puts the world on notice that, within a 300-foot zone perimeter surrounding a historic site, no general advertising sign is permitted if visible from the historic-site boundaries. While other zoning ordinances do provide for measurement between signs point-to-point along the abutting right-of-way, the purpose of these ordinances is to limit the distance *between* billboards, reducing visual clutter and distractions along the city streets. To follow the construction urged by the appellant of a point-to-point measurement along the abutting right-of-way (which in this case would exceed the 300 feet) would defeat the valid public purpose of restricting or minimizing visual blight surrounding a historic site, because the entire site is visually important, and not just the front. Even statutes in pari materia may not be resorted to where the language of the statute under consideration is clear. *Ryan v. Commrs. of Chatham County*, 203 Ga. 730, 732 (48 SE2d 86) (1948). As the ordinances requiring measurement of distance along the curb specifically provide for such a method of measurement, had the City Council intended for this method to be

used in the ordinance in question, it would have so stated in the ordinance. There is no evidence that the appellant ever had a general advertising sign permit granted involving any other listed historic site upon which it can now rely; the granting of permits to erect other general advertising signs under conditions other than a historic site is entirely different and unrelated.

The trial court did not err in holding that no state or federal equal-protection or due-process rights of the appellant have been violated and that the ordinance in question is not overly broad or overly restrictive, and is reasonable, clear and unambiguous.

2. The appellant argues that the "signs" which are prohibited under the ordinance should be interpreted to mean "sign copy" only, rather than the entire structure of a billboard, as here.

Section 16-28.019(13) specifies that "if any part of the general advertising sign is visible . . .," and it does not say "sign face" or "sign copy." In § 16-28.017 of the ordinance, "signs" are defined as "Any name, identification, description, display, illustration or device *which is affixed to* or represented directly or indirectly upon *a building, structure or land* in view of the general public and which directs attention to a product, place, activity, person, institution or business." (Emphasis supplied.) The language "affixed to . . . a building, structure or land" is used to distinguish between self-supporting billboards, and signs affixed to previously standing structures or buildings which have a separate and distinct use.

This interpretation is also supported by the numerous ordinance references to "sign copy" when referring to the face or advertising portion of the "signs." For example, § 16-28.019 states: "No permit shall be required for the substitution of *panels* or *faces* where the customary use of the *signs* involve frequent and periodic changes of *copy*." (Emphases supplied.) Reading the sign ordinance as a

whole, as is proper (see generally *Scott v. State*, 6 Ga. App. 332 (64 SE 1005) (1909)), it is clear that the BZA and trial-court interpretation of "sign," as encompassing the entire free-standing structure, is the required interpretation when taken in the context of the sign ordinance, and also as a matter of common sense. To construe "sign" to mean only "sign face" would defeat the clear intent and purpose of the ordinance, and would permit billboards to be erected on or adjacent to all boundaries of a historic site, provided the sign was angled or positioned so that the "sign face" could not be seen from the boundary.

3. The theory of estoppel against a municipal corporation may be applied, and is recognized by Georgia courts. See *Kiker v. City of Riverdale*, 223 Ga. 142 (154 SE2d 17) (1967); *City of Calhoun v. Holland*, 222 Ga. 817, 819 (152 SE2d 752) (1966). "A municipal corporation may be estopped, as right and justice may require, where the act or contract relied on to create the estoppel was within the charter powers of the corporation, although the method of exercising the power was irregular." *City of Summerville v. Ga. Power Co.*, 205 Ga. 843(2) (55 SE2d 540) (1949).

However, in each instance, it was the governing body, i.e., city council, rather than a mere employee carrying out a ministerial function, which knowingly chose or did such act which it tried to undo. Even the governing authority could not be estopped regarding an *ultra vires* act. *City of Calhoun v. Holland*, supra, p. 819. "Powers of all public officers are defined by law and all persons must take notice thereof. The public may not be estopped by the acts of any officer done in the exercise of an unconferred powers." OCGA § 45-6-5; *City of Atlanta v. Bull*, 161 Ga. App. 648 (288 SE2d 335) (1982), applying this rule to city officials; *City of Columbus v. Richardson*, 155 Ga. App. 573 (271 SE2d 706) (1980); *Gailey Contractors, Inc. v. Exxon Co., U.S.A.*, 143 Ga. App. 827 (240

SE2d 208) (1977). "There is no such doctrine known to the law as a set-off of wrongs. Not even estoppel can legalize or vitalize that which the law declares unlawful and void. If so, the conduct of individuals, whether independently or collusively, could render any and all laws invalid and impotent." *Flournoy v. Highlands Hotel Co.*, 170 Ga. 467, 471(1) (153 SE 26) (1930). The act of the official with the BOB who issued the building permit to the appellant was clearly unauthorized, because the ordinance in question prohibited the issuance of a building permit for the site in question. The ordinance grants authority to issue building permits only under such terms and conditions as are approved and authorized by the ordinance. The permit in question was not so authorized and therefore there can be no estoppel.

A second reason why equitable estoppel is inapplicable to this case is that equitable estoppel will not apply so as to frustrate or contravene a governmental function of a governmental unit. " 'Municipalities act in both a governmental and a proprietary capacity, and an estoppel is not asserted if such will embarrass a municipality in its capacity as a governing body or operate to prevent it from exercising its police power . . .' " *City of Jefferson v. Holder*, 195 Ga. 346, 355 (14 SE2d 187) (1943). In regulating zoning, a municipality is exercising its police power. *Barrett v. Hamby*, 235 Ga. 262, 265 (219 SE2d 399) (1975). It is a governmental function for which the municipality, for instance, is not liable in negligence. OCGA § 36-33-1. Even zoning based merely on aesthetic interests is a reasonable and proper exercise of the city's police power. *Gouge v. City of Snellville*, 249 Ga. 91(1) (287 SE2d 539) (1982). The continued existence of the appellant's billboard violates a city ordinance and interferes with the city's governmental powers; therefore, under an equitable balancing of interests, estoppel cannot be asserted against the city. Cf. *Simmons v. City of Clarkesville*, 234 Ga. 530 (216 SE2d 826) (1975). Fur-

thermore, the city acted immediately, upon discovering the mistake, to correct it, whereas the appellant ignored the city's stop-work orders, and instead hastened to complete construction of the billboard, including placement of the advertisement copy.

Finally, the vast majority of jurisdictions which have considered this issue have concluded that estoppel cannot be invoked against a governing authority under the type of circumstances existing here. E.g., Rathkopf, The Law of Zoning and Planning, pp. 67-2 -3, -5, -6 (1979); McQuillin, Municipal Corporation, § 25.153 (1983); *Maguire v. Reardon*, 255 U.S. 271 (41 SC 255, 65 LE 625) (1921); *Scanlon v. Faitz*, 57 Ill. App. 3d 649 (373 NE2d 614) (1978); *Paulus v. Smith*, 70 Ill. App. 2d 97 (217 NE2d 527) (1966); *Zahodian Engineering Corp. v. Zoning Board of Adjustment*, 8 N.J. 386 (86 A2d 127) (1952). The authorities cited by the appellant in opposition are distinguishable in that they do not involve illegal or ultra vires acts.

4. The remaining issue is the appellant's contention that the issuance of the building permit created constitutionally protected vested zoning rights which could not be revoked by the BZA and upon which the appellant can rely.

In *Barker v. County of Forsyth*, 248 Ga. 73, 75(2) (281 SE2d 549) (1981), this court stated the majority rule for vested rights to be: " 'A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, *prior to the effective date of the ordinance*, in reliance upon a permit theretofore *validly issued*, he has, *in good faith*, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations.' 3 Rathkopf, Law of Zoning and Planning, § 57-3; See, 49 ALR3d 13, § 3."

(Emphases supplied.) This rule has been applied in cases in which the building permit has been *validly* issued. E.g., *Schulman v. Fulton County*, 249 Ga. 852 (295 SE2d 103) (1982); *City of Atlanta v. Westinghouse Electric Corp.*, 241 Ga. 560 (246 SE2d 678) (1978); *Springtime, Inc. v. Douglas County*, 228 Ga. 753 (187 SE2d 874) (1972); *Craig v. City of Lilburn*, 226 Ga. 679 (177 SE2d 75) (1970).

However, the present case does not involve the issuance of a *valid* permit, because the permit here was prohibited by a valid zoning ordinance, i.e., § 16-28.019(13). "A permit issued for a use or structure which is forbidden by the ordinance is beyond the power of the officer to issue; consequently, it has no legal status, is invalid, and is itself entirely without power to clothe its holder with any legal rights thereunder." 56 Rathkopf, The Law of Zoning and Planning, § 1 (1964) and cit. "A permit for a use prohibited by a valid zoning ordinance, regulation, or restriction is void, of no effect, and subject to revocation. *This is true although the permit has been issued under a mistake of fact.*" (Emphasis supplied.) 8 McQuillin, Municipal Corporations, § 25.153 (3d ed., 1983). "The expenditure of even substantial sums in reliance upon a permit found to be void is generally held not to raise an estoppel against its revocation or against enforcement of the ordinance found to be violated by the use or structures maintained pursuant to the permit." Rathkopf, supra, § 56-13. In *Maguire v. Reardon*, 255 U.S. 271, supra, the Supreme Court upheld a state court's holding that a building already constructed but within a fire boundary was illegal, hence could be demolished without violating the federal Constitution.

The law in Georgia is in accord with the general rule. Several cases decided by this court show that when permits and licenses for construction have been issued, but the structure is later found to be in violation of the zoning laws, the municipality can proceed against the developer,

and no vested rights attach. In *Gray v. DeKalb County*, 230 Ga. 95 (195 SE2d 914) (1973), the county brought an action enjoining a housing developer from maintaining a house which had corners 8.6 and 1.2 feet from the property line, when the ordinance required a 10-foot setback. The zoning authorities—as in the case sub judice—did not discover the zoning violation until the house was 90% complete. This court noted, at p. 96, that "[the defendant], or his builder, obviously either failed to determine where the property lines were or intentionally failed to comply with the zoning regulations." The case of *Kiker v. City of Riverdale*, 223 Ga. 142, supra, makes clear that the issuance of both a license and a building permit is not sufficient to estop a city from enjoining a use in violation of a zoning ordinance, when the city is not otherwise aware of the illegality. Even though "the building was erected and the lot enclosed with a fence at a substantial cost," the *Kiker* court rejected the appellant's argument that the issuance of the permits together with expenditures in reliance thereon estopped the city.

Similar reasoning has been used by the Georgia courts when analyzing nonconforming uses. Nonconforming uses are uses of structures which were existing prior to the enactment of an ordinance rendering them nonconforming. However, our courts have been very careful to distinguish between *legal* nonconforming uses and *illegal* nonconforming uses. For example, the court in *Troutman v. Aiken*, 213 Ga. 55 (96 SE2d 585) (1957), stated that a nonconforming use for drag races on Sundays was not legally nonconforming, because the Sunday races were illegal without a special permit, and the property owner had never secured the necessary permit. And in *Ralston Purina Co. v. Acrey*, 220 Ga. 788, 791 (142 SE2d 66) (1965), the court stated: "Hence, even a nonconforming use would not be protected unless it appeared that it was lawful at its inception." Similarly, the court affirmed the trial court in *Tucker v. City of Atlanta*, 211 Ga. 157 (84 SE2d 362) (1954), in holding that, even though a permit

for general repairs had been issued to the Tuckers, it could not be used to illegally enlarge a nonconforming use, because such construction was in violation of the zoning laws regarding nonconforming uses.

Taken together, these cases show that a permit issued for either an illegal use or an illegal nonconforming use is void; it cannot be used as an excuse to continue the use in violation of a zoning ordinance, and it does not vest constitutional rights. This rule particularly applies when the permit is issued, as in this case, because of a good-faith mistake of fact and when city officials act immediately upon the discovery of their error. Hence, the law in Georgia, like the rule in nearly all jurisdictions, supports the conclusion that a permit for an illegal use is void and vests no property rights. In summary, in order for a property right to vest, it is essential that the building permit must be "based upon a permitted use under the zoning law then in force," *Clark v. International Horizons*, 243 Ga. 63, 65 (252 SE2d 488) (1979); that "a building permit has been legally obtained and is valid in every respect," *Keenan v. Acker*, 226 Ga. 896 (178 SE2d 196) (1970); and that the building permit must be "validly issued," *Barker v. County of Forsyth*, 248 Ga. 73, supra, p. 75.

The cases relied on by the appellant in no way alter this conclusion. In all of the vested-right cases cited by the appellant, the city or county officials had either changed their minds after assuring the applicant that the development was proper (see *Schulman v. Fulton County*, 249 Ga. 852, supra) or actually tried to amend the ordinances which had previously permitted the use in question (see *Barker*, supra; *Keenan v. Acker*, 226 Ga. 896, supra). None of these cases involves permits *mistakenly* issued or permits that are plainly illegal under the currently existing zoning ordinances. *Cobb County v. Peavy*, 248 Ga. 870 (286 SE2d 732) (1982), deals with the creation of vested rights upon issuance of a building permit

as opposed to a business licenses, and finds in dicta, quoting 3 Rathkopf, The Law of Zoning and Planning, p. 57-2, that a building permit is "an official certificate that a proposed structure and use, evidenced by the application and the plans and specifications filed therewith, are in conformity with the zoning regulations and other applicable ordinances as they exist and are in force at the time the permit is issued . . ." However, the *Peavy* court relied on the *Barker* case, supra, which involved the application for and verbal expressions of approval of a building permit *based on a valid ordinance*, hence *Peavy* is not authority for the appellant's position that the issuance of a building permit *in violation of the underlying zoning ordinance* creates a vested right.

In summary and conclusion, § 16-28.019 (13) was a valid zoning ordinance in existence not only in September, 1983, but also in March of 1984 when the third building permit was issued; each building permit was invalid and violated the clear and express terms and conditions of the ordinance, and the fact that a ministerial employee erroneously issued an illegal building permit upon which the appellant relied cannot vest any rights; the invalid and illegal building permit was void when issued, and could vest no property rights in the appellant with or without reliance; the appellant had notice of the clear, plain and unambiguous language of the ordinance, and knew that in nonhistoric-site cases a point-to-point measurement along the abutting right-of-way was employed by the BOB; if the appellant had any question as to the validity, meaning or correct interpretation of such ordinance, it could have requested an administrative interpretation by BOB, BZA or the city attorney prior to making a substantial expenditure based upon the permit; the appellant seeks to take advantage of the error in its favor and then argues that it has suffered substantial economic harm by relying on a void building permit, the validity of which could have been tested between September and

March; from the photographs in evidence, it is clear that, because of the substantial nature of the sign and unipole, such could be moved and reused at another location, although such would result in the loss of the expenses to take it down, move it and re-erect it.

Judgment affirmed. All the Justices concur, except Smith, J., who dissents.

The motion for a rehearing
was denied today, Mar. 28, 1985
Smith, J., who dissents

ON MOTION FOR REHEARING

41767

COREY OUTDOOR ADVERTISING, INC.

v.

BD. OF ZONING ADJUSTMENT OF THE
CITY OF ATLANTA *et al.*

Please substitute new pp. 1 and 2. No material changes made, but see changes in last paragraph on p. 1.

IN THE SUPREME COURT OF GEORGIA

41767

COREY OUTDOOR ADVERTISING, INC.

v.

THE BOARD OF ZONING ADJUSTMENTS OF THE CITY OF ATLANTA *et al.*

Decided: ———————

MARSHALL, Presiding Justice.

On September 8, 1983, the appellant (Corey) was issued a sign permit from the Bureau of Buildings (BOB) of the City of Atlanta to erect a billboard at 1558 Peachtree Street. The appellant renewed its permit on March 16, 1984. On March 22, 1984, the appellant received a permit for a larger, two-faced billboard at the same location (the permit at issue) after an inspection by a BOB inspector.

On May 30, 1984, the Georgia Trust for Historic Preservation notified the BOB that the billboard was being erected within 300 feet of Rhodes Memorial Hall, a historic property listed on the National Register of Historic Places, in apparent violation of § 16-28.019 (13) of the city ordinance, to wit: "General advertising signs shall not be erected on or within 300 feet *of the boundaries* of the following properties which are located on the National Register of Historic Places if *any part* of the general ad-

vertising sign is visible therefrom; . . . e. Rhodes Memorial Hall." (Emphases supplied.) The BOB confirmed this by investigation, and violation notices, removal notices and stop-work orders as to the south face of the billboard were posted on the structure and given to Corey's representatives.

Corey ignored these notices, completed the advertisement on the south face of the billboard, and appealed the issuance of these orders to the Atlanta Board of Zoning Adjustment (BZA). The Georgia Trust appealed to the BZA on the ground that the permit allowing *any* sign at that location violated the ordinance. The BZA ruled that the sign, as defined as the entire structure, including both the south and north faces, was within 300 feet of a historic-property boundary line in violation of the valid ordinance, and must be removed. Corey filed an appeal to the Superior Court of Fulton County, which appeal contained (1) a statutory appeal from the decision of the BZA; (2) an attack on the constitutionality of the underlying city zoning ordinance in question, § 16-28.019 (13); (3) a prayer for permanent injunctive relief to enjoin the BOB, the City of Atlanta and the BZA from revoking Corey's building permit; and (4) a prayer for a declaratory judgment that Corey had not violated § 16-28.019 (13) and that the building permit issued to it is valid and that Corey may rely on it to continue to use and maintain its sign on the property.

Superior court affirmed the BZA; Corey appeals; we affirm.

1. The appellant contends that the ordinance in question is unconstitutional in that it is vague, indefinite and ambiguous, therefore void and unenforceable under the federal and state Constitutions, because it fails to provide explicit standards for measuring the 300-foot distance, hence impermissibly delegates to the BOB the right on an ad hoc basis to determine the technique for measuring such distance restriction.

The clear purpose of the ordinance is to provide a zone of visual integrity around certain designated structures which the City of Atlanta has deemed to have historical significance, preventing general advertising signs from marring historical sites by distracting from the view, overshadowing the site, or lessening the impact of the site. The prohibition against any part of such signs' being visible from the site prevents the ordinance from being arbitrarily applied when natural topography, trees, buildings or structures screen out such signs from view on or within the boundaries of such historic site.

IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA

Civil Action File No. D-12498

COREY OUTDOOR ADVERTISING, INC.,
Plaintiff

vs.

THE BOARD OF ZONING ADJUSTMENT OF THE
CITY OF ATLANTA, *et al.*,
Defendants

ORDER

After oral argument and considering the entire record on appeal from the decision of the Board of Zoning Adjustment of the City of Atlanta, the Court rules:

1.

That the Plaintiff attacks Section 28.019 (13) of the Code of Ordinances of the City of Atlanta as unconstitutional in that it is vague, indefinite and ambiguous; therefore, void and unenforceable under the United States Constitution and the 1983 Constitution of the State of Georgia;

2.

Such Section 28.019 (13) reads in pertinent part:

> "(13) General advertising signs shall not be erected on or within 300 feet of the boundaries of the following properties which are located on the National Register of Historic Places if any part of the gen-

eral advertising sign is visible therefrom; except when such properties are historical districts or are located within SPI-1 districts, such sign shall not be located within 100 feet if any part of the general advertising sign is visible therefrom:

e. Rhodes Memorial Hall"

3.

Plaintiff contends that the ordinance fails to disclose the technique for measuring such distance and leaves it to the caprice of Bureau of Buildings of the City of Atlanta (hereinafter referred to as BOB) to interpret and to apply;

4.

Section 28.019 (13) is both simple and explicit in its prohibition against general advertising signs if two conditions are met; one, they cannot be on any boundary of the historical site or within 300 feet of any boundary of such historical site; and second, no part of the general advertising sign shall be visible from such historic site; the second requirement for the prohibition prevents the statute from being arbitrarily applied when natural topography, trees, buildings or structures screen out such sign from view on or within the boundaries of such historic site; the ordinance seeks to prevent general advertising signs from marring historical sites by distracting from the view, overshadowing the site or lessening the impact of the site, which are all perceptual responses to sight; the 300 foot restriction from any boundary is reasonable in an urban area because generally it would place many structures between the sign and the site, which structures would not block the sign view but would minimize its perceptual impact;

5.

"[E]rected on or within 300 feet of the boundaries . . ." sets forth clearly and unambiguously that such pro-

hibited distance is to be measured from any point on the "boundaries" of the historic site to any "part of the general advertising sign" which "is visible therefrom;" the world is put on notice that within a 300-foot zone perimeter surrounding a historic site no general advertising sign is permitted if visible from the historic site boundaries;

6.

To follow the construction urged by the Plaintiff of a point to point measurement along the abutting right of way would defeat the valid public purpose of restricting or minimizing visual blight surrounding a historic site because the entire site is visually important and not just the front; without the clearly expressed wording of the ordinance, general advertising signs could be placed on the rear and side boundaries of a historic site overshadowing and detracting from such sight; crass materialistic, political or ideological ideas antithetical to the historic site could detract from the site's importance for a visitor; to create a cordon sanitaire against general advertising signs, the ordinance sets out such 300-foot sign-free zone;

7.

The fact that other ordinances providing for sign location measured by point to point measured along the abutting right of way exist and are applied do not make Section 28.019(13) unconstitutional as a violation of procedural due process because Section 28.019(13) has a separate and distinct public purpose for using a different measurement from all boundaries of a historic site; there is no evidence that the Plaintiff ever had a general advertising sign permit granted involving any other listed historic site upon which they can now rely; the granting of permits to erect other general advertising signs under conditions other than a historic site are entirely different and unrelated;

8.

The Court finds that no state or federal equal protection or due process rights of the Plaintiff have been violated and that the ordinance Section 28.019(13) is not overly broad, not overly restrictive, is reasonable, clear and unambiguous;

9.

Since Section 28.019(13) prohibits general advertising signs near specific historic sites, then it must be strictly construed in favor of the property owner and ambiguities in the language resolved in favor of the property owner. Since there are no ambiguities in the wording of the ordinance and since a strict construction of the ordinance prohibits visible general advertising signs from a 300-foot wide perimeter around the boundaries of a historic site, then the sign in question is clearly prohibited both as to the North and South faces. Such ordinance specifies that "if any part of the general advertising sign is visible . . ." and it does not say sign face; to construe otherwise would result in a tortured construction that defeats the clear intent and purpose of the ordinance. If "sign" is read to mean only "sign face," then signs could be erected on or adjacent to all boundaries of a historic site, provided the general advertising sign was angled or positioned so that the "sign face" could not be seen from the boundary. If "sign" is construed to mean only advertising, then signs could be erected on or adjacent to all boundaries of a historic site and allowed to weather and to deteriorate until the ordinance can be changed or until the sign decays. Clearly "sign" includes "any part" so that both the frame, front and back panels, sign face, and sign copy come within the clear, plain and unambiguous meaning of "sign." Therefore, the Board of Zoning Adjustment of the City of Atlanta (hereinafter referred to as BZA) ruled that both North and South faces violated Section 28.019 (13);

10.

The theory of estoppel against a municipal corporation may be applied and is recognized by Georgia Courts, see *Kiker v. City of Riverdale*, 223 Ga. 142 (1967); *City of Calhoun v. Holland*, 222Ga. 817, 819 (1966). In *City of Summerville v. Georgia Power Co.*, 205 Ga. 843 (2) the Court held, "A municipal corporation may be estopped, as right and justice may require, where the act or contract relied on to create the estoppel was within the charter power of the corporation, although the method of exercising the power was irregular." However, in each such instance, it was the governing body, i.e., city council, rather than a mere employee carrying out a ministerial function, who knowingly chose or did such act which it tried to undo. Even the governing authority, i.e., city council, could not be estopped regarding an *ultra vires* act, *City of Calhoun v. Holland, Supra*, at p. 819. *City of Columbus v. Richardson*, 144 Ga. App. 573 (1980) shows that when the authority who has the power to make policy disregards prior conduct and issues a license, it cannot later revoke such license based upon such prior conduct. Such doctrine of esto-pel does not apply to conduct of ministerial employees who issue licenses or permits based upon ordinances because such employees lack the power or discretion to waive such compliance with the ordinance and has no discretion to exercise in the issuance of permits and licenses. Here the BOB and its employees acted in a non-discretionary ministerial capacity only; such doctrine is inapplicable under the facts and circumstances of this case because the issuance of the building permit was *ultra vires* by BOB. The BZA had the power and discretion to change or alter policy and chose to apply the ordinance as written; therefore, estoppel does not apply under these facts;

11.

The remaining issue involves the alleged vesting of a constitutionally protected property right by the issuance

of a building permit and the incurring of substantial expense in reliance upon such building permit.

12.

Exhibit 12 before the BZA shows a building permit issued to the Plaintiff on September 8, 1983. Exhibit 13 was a ground lease between the C & S National Bank as Trustee u/a James C. Kenan, et al and Zesto Products, Inc. to the Plaintiff; Item V contains an escape clause for the lessor to terminate the lease without penalty if any billboard is required to be removed by any state or local authority; Exhibit 16, dated February 14, 1984, shows a sign construction cost of $42,246; Exhibit 17 shows a building permit for a smaller sign; Exhibits 20 through 31 show further sign costs;

13.

" 'A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures or has incurred substantial obligations.' [Cit. omit.] . . . where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit." *Baker v. County of Forsyth*, 248 Ga. 73, 76 (1981). Such zoning officials were those who had not only the power but also the discretion to make zoning policy so as to make the permit come within a legal zoning use. Once a valid building

permit, special use permit or a license has been issued, the issuing authority cannot retroactively pass an ordinance denying such use or revoke such use by reconsidering a building permit already issued. Reliance is not necessary for property rights to vest based upon a legal and valid building permit; *Schulman v. Fulton County*, 249 Ga. 852, 853 (1982); *Clark v. International Horizons, Inc.*, 243 Ga. 63 (1979); *Keenan v. Acker*, 226 Ga. 896 (1970); for such property right to vest, it is essential that such building permit must be "based upon a permitted use under the zoning law then in force," *Clark v. International Horizons, Inc., Supra* at p. 65, that "a building permit has been legally obtained and is valid in every respect," *Keenan v. Acker, Supra*, at p. 896, and that the building permit must be "validly issued," *Baker v. County of Forsyth, Supra* at p. 76;

14.

Section 28.019 (13) was a valid zoning ordinance in existence not only in September, 1983, but also in March of 1984 when the third building permit was issued; each building permit was invalid and violated the clear and express terms and conditions of the ordinance, and the fact that a ministerial employee erroneously issued an illegal building permit upon which the Plaintiff relied cannot vest any rights; the invalid and illegal building permit was void when issued and could vest no property rights in the Plaintiff with or without reliance; Plaintiff had notice of the clear, plain and unambiguous language of the ordinance and knew that in non-historic site cases a point to point measurement along the abutting right of way was employed by the BOB; if Plaintiff had any question as to the validity, meaning or correct interpretation of such ordinance, then it could have requested an administrative interpretation by BOB, BZA or City Attorney prior to making a substantial expenditure based upon the permit; Plaintiff seeks to take advantage of the error in its favor and then argues that it has suffered

substantial economic harm by relying on a void building permit which validity could have been tested between September and March; from the photographs in evidence, it is clear that because of the substantial nature of the sign and unipole that such could be moved and reused at another location although such would result in the loss of the expenses to take it down, to move it and to re-erect it;

15.

The Court affirms the decision of the Board of Zoning Adjustment of the City of Atlanta.

SO ORDERED this 5 day of October, 1984.

/s/ Frank M. Eldridge
FRANK M. ELDRIDGE, *Judge*
Fulton Superior Court
Atlanta Judicial Circuit

[SEAL]

CITY OF ATLANTA
800 City Hall, Atlanta, Georgia 30335
404-658-6336

CERTIFIED

July 17, 1984

William E. Corey, President
Corey Outdoor Advertising, Inc.
1570 Iris Drive
Conyers, Georgia 30307

OFFICIAL CORRECTION NOTICE

RE: Renovation of Sign Permit
at 1558 Peachtree Road, N.E.

Dear Mr. Corey:

This letter is intended to serve as an official correction notice to remove the general advertising sign in its *entirety* at 1558 Peachtree Road, N.E., Atlanta, Georgia on or before August 17, 1984. Specifically, Permit #S8400224 and the supplemental permit #S8400250 are hereby necessarily revoked in accordance with the decision of the Board of Zoning Adjustment meeting of July 6, 1984. In summary, the Board sustained the appeal of the Georgia Trust for Historic Preservation (V-84-137) and denied your appeal of the decision of the Director of the Bureau of Buildings (V-84-138). Copies of these variance findings are attached for your convenience.

Failure to comply by the above deadline will result in legal action against you. If you have questions, please feel free to call me at 658-6335.

Sincerely,

/s/ Norman A. Koplon
NORMAN A. KOPLON, P.E.
Acting Director

NAK/as

cc: Mr. Tom Bowman, Associate City Attorney
Mr. Bob Zeckler, Associate City Attorney
Mr. Tom Pullen
Mr. Henry Bauer

APPENDIX B

IN THE SUPREME COURT
STATE OF GEORGIA

Case No. 41767

COREY OUTDOOR ADVERTISING, INC.
Plaintiff-Appellant,

v.

THE BOARD OF ZONING ADJUSTMENT
OF THE CITY OF ATLANTA, ET AL.
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1.

Notice is hereby given that Corey Outdoor Advertising, Inc. hereby appeals to the Supreme Court of the United States from the opinion entered March 14, 1985 affirming the Order of the Fulton Superior Court dated October 5, 1984 and from this Court's Order dated March 28, 1985 denying Appellant's Motion for Rehearing.

2.

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

3.

The Clerk will please transmit the entire record in this cause to the Clerk of the Supreme Court of the United States.

This 6th day of June, 1985.

Respectfully submitted,
BAUER, DEITCH & RAINES, P.C.

By: /s/ H. R. Bauer
HENRY R. BAUER, JR. (042500)
Counsel for Plaintiff-Appellant

1500 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 588-1500

CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies each of the within and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon Thomas Bowman, Esq., 1100 South Omni International, Atlanta, Georgia 30335 and Dennis Hall, Esq., 2 Piedmont Center, Suite 507, 3565 Piedmont Road, N.E., Atlanta, Georgia 30305 by depositing said copy in the United States Mail in a properly addressed envelope with sufficient postage affixed thereon to assure delivery.

This 6th day of June, 1985.

/s/ H. R. Bauer
HENRY R. BAUER, JR.
Counsel for Plaintiff

This 6th day of June, 1985.

Respectfully submitted,
BAUER, DEITCH & RAINES, P.C.

By: /s/ H. R. Bauer
HENRY R. BAUER, JR. (042500)
Counsel for Plaintiff-Appellant

1500 Peachtree Center Harris Tower
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This 6th day of June, 1985.

/s/ H. R. Bauer
HENRY R. BAUER, JR.
Counsel for Plaintiff

APPENDIX C

Section 16-28.019(13)

(13) General advertising signs shall not be erected on or within 300 feet of the boundaries of the following properties which are located on the National Register of Historic Places if any part of the general advertising sign is visible therefrom; except when such properties are located within the SPI-1 district, such sign shall not be located within 100 feet if any part of the general advertising sign is visible therefrom:

8. Rhodes Memorial Hall

Section 16-28.019(7)

(7) *Limitations on signs near freeways, expressways:* In addition to sign limitations established by district regulations, it shall be unlawful for any person to build, use or maintain, within a distance of 300 feet of the nearest outer edge of the pavement of the interstate highway, limited-access freeway or expressway system within the city, any general advertising sign; except that there may be on each lot adjoining the system one (1) sign facing the system not exceeding 50 square feet in area advertising such lot for sale or lease, and on each lot adjoining the system, or on a lot upon which a building permit has been issued for the conduct of business, one (1) sign of not more than 200 square feet in area facing the system designating the particular business which is being actually conducted thereon or to be conducted thereon. Any sign within said 300-foot zone involving direct illumination or animation shall require the approval of the bureau of traffic and transportation prior to issuance of a building permit or the erection of such sign. These provisions shall not be construed as authorizing more signs or larger signs than generally permitted within the district in which the sign is erected.

Section 16-11.011 Limitations on signs.

The following sign regulations shall apply to all uses approved by special permits as well as permitted uses (see section 16-28.017):

(6) General advertising signs shall be permitted subject to the following restrictions:

(c) A general advertising sign shall not be located within 200 feet of another general advertising sign on the same side of the street as measured point to point along the abutting right-of-way; provided, however, such a sign may be located within 200 feet of another sign when the signs are separated by buildings or other obstructions so that only one (1) sign facing within the 200-foot zone is visible from the fronting street at any one (1) time. On streets which are a part of the interstate highway, limited-access freeway or expressway system within the city, no general advertising sign shall be located within 1,000 feet of another general advertising sign on the same side of the highway as measured point to point along the abutting right-of-way. Provided, however, such a sign may be located within 1,000 feet of another sign when the signs are separated by buildings or other obstructions so that only one (1) sign facing located within the 1,000-foot zone is visible from the fronting highway at any one (1) time. (Ord. No. 1984-35, Sec. 3, 6/6/84)

32-6-72. Designation of outdoor advertising which may be erected or maintained within 660 feet of nearest edge of right of way.

No outdoor advertising shall be erected or maintained within 660 feet of the nearest edge of the right of way and visible from the main traveled way of the interstate or primary highways in this state, except the following:

(1) Directional and other official signs and notices;

(2) Signs advertising the sale or lease of the property upon which they are located;

(3) Signs advertising activities conducted or maintained within 100 feet of the nearest part of the activity as the dimensions of said activity are determined by department regulations, which regulations need not take into consideration the property lines of said activity;

(4) Signs located in areas zoned commercial or industrial, which signs provide information in the specific interest of the traveling public;

(5) Signs located in unzoned commercial or industrial areas, which signs provide information in the specific interest of the traveling public; and

(6) Directional signs, displays, and devices about goods and services in the specific interest of the traveling public, located in a defined area or areas approved by the United States Secretary of Transportation. (Ga. L. 1967, p. 423, § 3; Ga. L. 1971, Ex. Sess., p. 5, § 3; Code 1933, § 95A-915, enacted by Ga. L. 1973, p. 947, § 1; Ga. L. 1979, p. 1086, § 3.)

28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treat or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 26, 1948, c. 646, 62 Stat. 929.